Supreme Court U.S.
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No. 00-

IN THE

Supreme Court of the United States

KOREAN AIR LINES CO., LTD.,

Petitioner,

v.

BRANDI WALLACE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a passenger's sexual assault of another passenger in an adjacent seat on board the aircraft constitute an "accident" within the meaning of Article 17 of the Warsaw Convention despite the absence of a causal role on the part of the air carrier?

PARTIES TO THE PROCEEDING

The following persons and entities were parties before the United States Court of Appeals for the Second Circuit:

1. Petitioner KOREAN AIR LINES CO., LTD.

2. Respondent Brandi Wallace

STATEMENT PURSUANT TO RULE 29.6

Petitioner KOREAN AIR LINES CO., LTD. ("KAL") is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL has no parent company but is a member of The Hanjin Group of Korea, which comprises companies under common management direction. No publicly held company owns 10% or more of KAL's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Korean Air Lines Co., Ltd. ("KAL") respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on June 6, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is officially reported at 214 F.3d 293 (2d Cir. 2000) and is reproduced in the Appendix hereto at A 1a-16a.[1] The Opinion and Order of the District Court is unofficially reported at 1999 WL 187213 (S.D.N.Y. Apr. 6, 1999), and is reproduced at A 17a-28a.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 6, 2000. KAL's timely petition for rehearing was denied by Order dated July 12, 2000 (A 29a-30a) and this Petition has been filed within 90 days of that date. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934) (*reprinted in* note following 49 U.S.C.A. § 40105) ("Warsaw Convention"). The pertinent provisions are set forth in the Appendix at A 31a.

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1. References preceded by "A" refer to pages in the Appendix hereto.

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff Brandi Wallace ("Wallace") brought an action against KAL to recover damages as a result of being sexually assaulted by another KAL passenger during KAL flight 61 from Seoul, Korea to Los Angeles, California. It is undisputed that the action is governed exclusively by the Warsaw Convention, as the incident of which Wallace complained occurred during the course of "international transportation by air" within the meaning of Article 1 of the Convention.[2] The jurisdiction of the District Court was based upon federal question (28 U.S.C. § 1331) under the Warsaw Convention and there is diversity of citizenship (28 U.S.C. § 1332). The jurisdiction of the Court of Appeals was based upon 28 U.S.C. § 1291.

The Warsaw Convention creates air carrier liability for "bodily injury" of a passenger if the damage sustained was proximately caused by an "accident" within the meaning of

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2. Article 1(1) states that the Convention applies "to all international transportation of person, baggage, or goods performed by aircraft for hire." 49 Stat. 3014. Article 1(2) states that "international transportation" includes any transportation in which

> the place of departure and the place of destination . . . are situated . . . within the territory of a single High Contracting Party, if there is an agreed stopping place within the territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.

Id. Wallace was travelling pursuant to a ticket that provided for round-trip transportation by air, U.S.-Korea-U.S.

the Article 17 of the Convention. The sole legal question presented by this Petition is whether injuries that a plaintiff does not dispute were the result of a passenger-on-passenger assault can constitute an "accident" within the meaning of Article 17.

B. Statement of Relevant Facts

Plaintiff Brandi Wallace was an economy class passenger on a KAL Boeing 747 aircraft from Seoul, Korea to Los Angeles, California on August 17, 1997. The standard economy class seat row configuration for all Boeing 747 aircraft consists of 11 seats (A–K) arranged as follows:

{window} **ABC** [aisle] **DEFGH** [aisle] **IJK** {window}

Wallace was seated in seat 43K, a window seat.

Within one hour of departure from Seoul, Wallace consumed a meal and had a drink. After the meal service, Wallace began to read a book and 30 minutes thereafter she fell asleep. Approximately three hours after the KAL flight departed Seoul, Wallace awoke to find that Kwang-Yong Park ("Park"), the passenger seated next to her (seat 43J), had his hand in her underwear. Wallace quickly turned away from Park, causing Park to remove his hand. When Park tried to touch Wallace again, she struck Park "hard" and reported the incident to a KAL crew member. The KAL crew member *immediately* assigned Wallace a new seat. Park was arrested upon arrival of the flight in Los Angeles.

Wallace commenced an action against KAL alleging that KAL was "absolutely" liable for the assault under the terms

of the Warsaw Convention, as supplemented by the Montreal Agreement.[3] Wallace, however, has since conceded that the assault was not caused "by a lack of due care on the part of" KAL. *See* Brief for Plaintiff-Appellant at 2, 12 (2d Cir., dated Aug. 27, 1999) (pertinent excerpts are reproduced at A 33a-34a).

C. Disposition by the Courts Below

1. The Decision of the District Court

After limited discovery on the circumstances surrounding the incident, Wallace moved for partial summary judgment on the issue of KAL's liability under the Warsaw Convention. The District Court denied the motion and dismissed Wallace's claim, finding that the sexual assault by Park did not constitute an "accident" within the meaning of Article 17 of the Convention. *Wallace v. Korean Air*, 1999 WL 187213 at *4 (A 17a).

On the basis of the Court's decision in *Air France v. Saks*, 470 U.S. 392, 405 (1985), and numerous post-*Saks* cases involving passenger assaults, the District Court found that the incident in this case was not an "accident" because

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3. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in* note following 49 U.S.C. § 40105 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302). Pursuant to the Montreal Agreement, air carriers, by special contract, voluntarily agreed to increase the limit of liability to $75,000 and to waive the defense of all necessary measures for passenger injury or death set forth in Article 20(1) (A 31a) of the Convention. *See Air France v. Saks*, 470 U.S. 392, 406-07 (1985).

there "was no act or omission by the aircraft or airline personnel representing a departure from the normal, expected operation of the flight," and because a sexual assault "is not a risk characteristic of air travel or related to the operation of the airplane." A 21a-27a. In sum, the District Court held "that air carriers should be liable for torts that are proximately caused by the abnormal or unexpected operation of the aircraft or the abnormal or unexpected conduct of airline personnel." A 25a. Accordingly, the District Court dismissed the action for lack of an Article 17 "accident."

2. Reversal by the Court of Appeals

The Majority Opinion. The Majority Opinion of the court below first noted the wide-ranging and often competing views as to the meaning of the term "accident." A 10a-11a. Then, assuming that the District Court's definitions of an Article 17 "accident" to be correct, the court below relied on what it considered to be the "narrower characteristic risk of air travel approach" and held that the sexual assault was an Article 17 "accident." A 11a-12a. Under this approach an "accident" " 'must arise from such risks that are characteristic of air travel.' " A 10a. The court below stated that "[t]hough a close question," its conclusion was reached "mindful of the '*virtual strict liability*' imposed on air carriers by the Warsaw regime," and in deference to the Court's admonition in *Saks* to interpret the term "accident" both "flexibly" and "broadly." A 12a (emphasis added). The court below, however, declined to decide whether all co-passenger torts can be considered an "accident" within the meaning of Article 17.

The court below instead held that the assault of this passenger by a fellow passenger was an "accident" based on the court's assumptions[4] that:

1. the characteristics of economy class seating in air travel increased Wallace's vulnerability to Park's assault (*i.e.*, Wallace was "cramped into a confined space beside two men she did not know" with the "lights turned down") (A 12a-13a); and

2. KAL did not notice the assault by Park (*i.e.*, the assault was "in the dark" and "could not have been five-second procedures even for the nimblest of fingers"; "nor could they have been entirely inconspicuous") (A 13a).

The court below elected to ignore plaintiff Wallace's concessions that there was no lack of due care by KAL and that no acts or omissions of KAL caused or contributed to the assault. *See* A 33a-34a.

The Concurring Opinion. The Concurring Opinion agreed in the result but would have decided the case solely on the grounds that the assault by Park was an unusual and unexpected event that was external to Wallace, *i.e.*, by ostensibly applying a literal reading of the *Saks* decision. A 14a-16a.

KAL's petition for panel rehearing and rehearing en banc was denied. A 29a-30a.

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4. The "factual" findings by the court below in the Majority Opinion as to the manner of the attack were not based on *any* evidence adduced in the record. There is no evidence in the record: (1) as to how long it took Mr. Park to unbuckle plaintiff's clothing; (2) that the assault "could not have been five-second procedures even for the nimblest of fingers"; (3) as to the duration of the attack prior to Wallace waking up; or (4) as to whether the attack would or should have been conspicuous to KAL flight attendants. A 12a-13a.

REASONS FOR GRANTING THE WRIT

The court below has held that an airline is absolutely liable under Article 17 of the Warsaw Convention for the assault of a passenger by a fellow passenger, even when the victim of the assault concedes that no act or omission of the airline caused or contributed to the assault. The decision of the court below is fundamentally wrong. The Warsaw Convention treaty cannot sensibly be interpreted as providing for absolute liability for a passenger's injury where it is conceded that the airline did nothing wrong.

Article 17 of the Warsaw Convention sets forth the circumstances under which an air carrier may be liable for an injury to a passenger. Article 17 provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, *if the accident which caused the damage so sustained* took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018 (emphasis added) (A 31a).

The Court in *Saks*, 470 U.S. at 392, shed some light on the meaning of "accident," a case in which the district court had held that a passenger who sustained an ear injury caused by the normal cabin pressurization changes during landing could not recover damages unless she could show some malfunction or abnormality in the aircraft's operation. *See Saks v. Air France*, 724 F.2d 1383, 1384 (9th Cir. 1984)

(recounting the district court decision). Reversing this ruling, the Ninth Circuit held that a showing of a malfunction or abnormality in the aircraft's operation was not a prerequisite to liability under the Convention, and further held that the Convention and the Montreal Agreement imposed absolute liability on airlines "for injuries proximately caused by the risks inherent in air travel." *Id.* at 1387-88. The Court in *Saks* wisely disagreed.

The Court rejected the Ninth Circuit's reading of Article 17 and held that liability exists only if the passenger proves that an "accident" caused the injury. The Court stated that an Article 17 "accident" "arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger." *Id.* at 405. The "narrow issue presented" in *Saks* was framed by plaintiff's ear injury caused by the normal operation of the flight. Therefore, the Court held only that "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406.

After *Saks*, until this case, the lower courts uniformly have refused to find an Article 17 "accident" for passenger-on-passenger assaults, *unless* the airline plays a causal role in the commission of the assault .[5] The decision of the court

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5. *See Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 70-71 (1st Cir. 2000); *see also Gezzi v. British Airways*, 991 F.2d 603, 604 (9th Cir. 1993) (noting that passenger assault does not relate to the operation of the aircraft); *Tsevas v. Delta Air Lines, Inc.*, 1997 WL 767278 (N.D. Ill. Dec. 1, 1997) (intoxicated passenger's

(Cont'd)

below ignored the standard set forth by these cases and erroneously applied the Ninth Circuit "the hazards of air travel" approach (*see Saks*, 724 F.2d at 1387), implicitly rejected by the Court in *Saks*.

Thus, the court below erred in a decision that conflicts with the decision of the Court of Appeals for the First Circuit in *Langadinos v. American Airlines, Inc.*, 199 F.3d 68 (1st Cir. 2000), which held that where airline personnel play no causal role in the commission of the tort, there is no Article 17 "accident." The court below chose to ignore *Langadinos*. More importantly, the court below issued a decision that conflicts with the holding and rationale of the Court's decision in *Saks*. While claiming to apply *Saks*, the court below, in effect, chose to ignore *Saks* and applied the discredited rationale of the Ninth Circuit in *Saks*.

The court below also chose to ignore that in 1929 the primary purpose of the Convention was to create a regime

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(Cont'd)
unwanted sexual advances, coupled with the refusal of flight attendants to intervene, is "accident"); *Stone v. Continental Airlines, Inc.*, 905 F. Supp. 823 (D. Hawaii 1995) (plaintiff punching another passenger is not risk characteristic of air travel); *Curley v. American Airlines, Inc.*, 846 F. Supp. 280, 283 (S.D.N.Y. 1994) (detention and search by Mexican authorities due to accusation of smoking marijuana in airplane lavatory "hardly a characteristic risk of air travel"); *Price v. British Airways*, 1992 WL 170679 at *2-3 (S.D.N.Y. July 7, 1992) ("To suggest that a fistfight between two passengers is a characteristic risk of air travel is absurd"). *Accord* Goedhuis, *National Airlegislations and the Warsaw Convention* at 200 (The Hague 1937) ("In the example . . . in which a passenger is injured in a fight with another passenger, it would be unjustifiable to declare the carrier liable by virtue of Article 17, because the accident which caused the damage had no relation with the operation of the aircraft").

of limited air carrier liability. *See Eastern Airlines v. Floyd*, 499 U.S. 530, 546 (1991); *see also Second International Conference on Private Aeronautical Law, Oct. 4-12, 1929, Warsaw Convention Minutes* at 42, 47-48 (R. Horner & D. Legrez transl. 1975) ("*1929 Warsaw Minutes*").[6] The interpretation of the term "accident" by the court below is contrary to this goal.

Finally, the court below chose to ignore the understanding of the contracting states. The decision of the court below conflicts with the post-ratification understanding of the contracting parties to the Warsaw Convention, as the contracting states have consistently considered the term "accident" to preclude air carrier liability for passenger-on-passenger assaults.

The decision of the court below is fundamentally flawed. To allow the decision of the court below to stand would foster confusion and disarray in the lower courts with respect to the proper application of a treaty of the United States.

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6. Before the Warsaw Convention was adopted, carriers in civil law countries were permitted to contractually disclaim any liability for passenger injury or death. The drafting history of the Convention reflects the drafters' compromise with respect to passengers, between no liability and exposure to unlimited liability. *See 1929 Warsaw Minutes* at 47-48.

I.

THE DECISION OF THE COURT BELOW CONFLICTS WITH THE COMPELLING, PRAGMATIC CONCLUSION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT THAT AN ARTICLE 17 "ACCIDENT" REQUIRES A CAUSAL ROLE BY AIRLINE PERSONNEL

While the lower courts have wrestled with the *Saks* definition in various contexts, until the case at bar, the lower courts uniformly have held that an assault of a passenger by a fellow passenger is not an Article 17 "accident" where the airline plays no causal role in the commission of the assault. *See supra* note 5.

This rule was reiterated succinctly only six months prior to the decision of the court below by the Court of Appeals for the First Circuit in the *Langadinos* decision, which the court below failed to address (even though brought to its attention by the parties pursuant the Fed. R. App. P. 28(j)).

In *Langadinos*, a case addressing whether the sexual assault of a male passenger by another male passenger could be an Article 17 "accident," the First Circuit stated:

> Of course, not every tort committed by a fellow passenger is a Warsaw Convention accident. Where the airline personnel play no causal role in the commission of the tort, courts have found no Warsaw accident. [citations omitted]. On the flip side, courts have found Warsaw accidents where airline personnel play a causal role in a passenger-on-passenger tort. [citation omitted].

199 F.3d at 70-71.

While the court in *Langadinos* found a causal airline role and thus that plaintiff's claim could fall within the ambit of an Article 17 "accident" (at least for purposes of defeating a motion for summary judgment), the court's conclusion was premised on plaintiff's allegations, that (1) the assaulting passenger visibly appeared "intoxicated, aggressive and erratic," (2) the airline was on notice of the passenger's behavior, and (3) despite this awareness, the airline continued to serve alcohol to the assaulting passenger. 199 F.3d at 71. The court explained: "Serving alcohol to an intoxicated passenger may, in some instances, create a foreseeable risk that the passenger will cause injury to others." *Id.* The case was remanded to the district court for further proceedings with the court noting that plaintiff was still required to establish that the airline's conduct was a proximate cause of the injury and a compensable injury. *Id*

In this case, Wallace has made no allegations resembling those found significant in *Langadinos*. To the contrary, Wallace had conceded that no acts or omissions of KAL caused or contributed to the assault. A 33a-34a. The decision of the court below is irreconcilable with *Langadinos* — under *Langadinos*, there is no "accident" for Park's assault of Wallace; under *Wallace*, Park's assault is an "accident."

The court below has created a conflict between the First and Second Circuits as to whether a sexual assault constitutes an Article 17 "accident" where "the airline personnel play no causal role in the commission of the tort."

II.

THE DECISION OF THE COURT BELOW CANNOT BE RECONCILED WITH THE BASIC TENETS OF *SAKS*

The principles of *Saks* can fairly be summarized as follows:

- The passenger's injury must be "caused by" an Article 17 "accident" defined as an "unexpected or unusual event or happening that is external to the passenger" (470 U.S. at 405);

- There is no "accident" if the injury is caused by the usual, normal and expected operation of the aircraft (470 U.S. at 406);

- The almost "absolute liability" regime created by the Montreal Agreement cannot serve as a basis to expand or alter the meaning of "accident" intended by the drafters of Article 17 (470 U.S. at 406-07); and

- The "accident" requirement of Article 17 involves "an inquiry into the nature of the event which caused the injury rather than the care taken by the airline to avert the injury" (470 U.S. at 408).

The post-*Saks* application of the above principles to passenger-on-passenger assaults has reflected the lower courts' recognition, except in the court below, that to hold that a passenger injury was caused by an Article 17

"accident", the proximate cause of the injury must be some abnormal or unexpected operation of the aircraft or abnormal or unexpected conduct of airline personnel. *See supra*, note 5.

A. An Article 17 "Accident" Cannot Properly Be Grounded On a Finding that the Injury Was the Result of a Risk Characteristic of Air Travel

Subsequent to *Saks*, although the lower courts have imposed liability in cases where the operation of the aircraft or acts or omissions by airline personnel have furthered injuries by fellow passengers, all of the passenger-on-passenger assault cases are founded on the basic principle that liability under the Warsaw Convention must be premised upon the abnormal or unexpected operation of the aircraft or the abnormal or unexpected conduct of airline personnel. *See supra* note 5. The court below failed to recognize this basic premise, which enabled the court below to justify its application of the "characteristic risk of air travel approach" in order to find liability. A 10a-13a.

Under the "characteristic risk of air travel approach" as used by the court below, so long as the characteristics of air travel were found to have "increased Ms. Wallace's vulnerability to Mr. Park's assault," liability can be imposed. A 12a-13a. Thus, ironically, the court below found that the *normal* conditions in the operation of the aircraft created a risk of injury giving rise to liability. A 12a-13a. This conclusion is illogical and at odds with the basic tenets of *Saks* that the injury must be caused by an "accident" and to be an "accident," the cause must be unusual and unexpected.

1. The Adjoining Nature of Economy Class Seating Is Neither Unusual Nor a Risk of Air Travel

The court below found that the characteristics of economy class travel increased a passenger's vulnerability to a sexual assault. A 12a. However, the court failed to point to any characteristic in economy class seating that was unusual, unexpected or abnormal to the operation of the aircraft. The characteristics found significant by the court below, a female who may fall asleep seated next to an unknown male during a lengthy flight in a cabin with dimmed lights, *cannot be both unusual and unexpected in air transportation and a characteristic of air travel.*[7] *See Potter v. Delta Airlines, Inc.*, 98 F.3d 881, 884 (5th Cir. 1996). Moreover, the court below failed to explain how the characteristics of economy class seating in any event "caused" passenger Park to assault passenger plaintiff Wallace.

2. An Assaulting Passenger Surely Cannot Be Considered a Characteristic Risk of Air Travel

The proper inquiry under the standard set forth by the court below was whether passenger Park, who caused the injury, was a characteristic risk of air travel. He was not.

As set forth by the First Circuit, the "risk" contemplated by Article 17 must be unique to air travel, as distinct from

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7. In fact, such seating is common in any mode of multiple passenger transportation (*e.g.*, bus, rail, subway) or public setting where strangers are seated alongside each other in a confined space and left "unsupervised in the dark" (*e.g.*, movie theatre, concert, university lecture hall). The Concurring Opinion noted that sitting next to a stranger is "not so much a characteristic of air travel as it is a characteristic of any form of public transportation." A 14a, n.1.

any other mode of transportation or as to which transportation by air is peculiarly susceptible. *Hernandez v. Air France*, 545 F.2d 279, 284 (1st Cir. 1976) (to impose liability under the Convention, there should be a close logical nexus between the injury and air travel *per se*); *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152, 157 (3d Cir. 1977) (terrorism and hijacking closely associated with air transportation); *see also Day v. Trans World Airlines*, 528 F.2d 31, 37-38 (2d Cir. 1975); *Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400, 412 (E.D. Pa. 1977); *Rullman v. Pan American World Airways*, 122 Misc. 2d 445, 447-49 (N.Y. Sup. Ct. 1983).

The risk of a sexual attack as alleged in this case is not a "risk characteristic of travel by aircraft, but rather a risk characteristic of living in a world such as ours." *Hernandez*, 545 F.2d at 284. For this reason, until *Wallace*, each court that has addressed the "accident" issue in the context of "risk" has found that one passenger assaulting another passenger is *not* a risk characteristic of air travel, and has declined to impose Article 17 liability absent a showing that the airline played causal role in the commission of the tort. *See supra* note 5.

Under the rationale of the court below, virtually any event on board an aircraft can be molded into a "risk characteristic of air travel." *Saks* and Article 17 plainly cannot be read so expansively. The decision of the court below conflicts with the First Circuit's pre-*Saks* decision in *Hernandez*, which makes clear that the "risk" falling within the Warsaw Convention must be unique to aviation/air travel (such as the circumstance where the "aircraft and the fact of air travel are a prerequisite to the crime"), as opposed to any other mode of transport or close encounter situation, and the

First Circuit's post-*Saks* decision in *Langadinos*, which upheld the express term of Article 17 that the airline's act or omission must have "caused" the damage so sustained.

B. An Article 17 "Accident" Cannot Be Found Where a Passenger Concedes that No Act or Omission of the Air Carrier Caused or Contributed to the Passenger's Injuries

The factual assumptions and findings as to how the attack occurred and what could or should have been seen by KAL were improperly set forth by the court below. A 13a. Moreover, the court below failed to follow the Court's admonition in *Saks* that the "accident" requirement of Article 17 involves "an inquiry into the nature of the event which caused the injury rather than the care taken by the airline to avert the injury." *Saks*, 470 U.S. at 407.

Indeed, the factual assumptions noted by the court below (*e.g.*, "nimbleness" of a passenger's fingers) can in no way properly serve as a foundation for air carrier liability. Moreover, the lower court's professed recognition that KAL was unaware of the assault should have lead the court to affirm the dismissal of the action against KAL because post-assault conduct on the part of KAL necessarily cannot serve as a predicate to liability for "damage sustained" as a result of the assault.

There was only one cause of Wallace's injury — that cause was the criminal misconduct of passenger Park. There was no Article 17 "accident."

C. The Promulgation by the Court Below of a Perceived Virtual Strict Liability Regime Conflicts With *Saks* and *Tseng*

The court below resolved its "close question" whether a sexual attack is an "accident" by being "mindful" of it conclusion that a "virtual strict liability" regime has been created by the Montreal Agreement. A 12a. The Court in *Saks*, however, expressly held that the Montreal Agreement is *not* relevant to the determination of the meaning of an Article 17 "accident" because the Montreal Agreement in no way modifies Article 17. *Saks*, 470 U.S. at 406-07 ("Our duty to enforce the "accident" requirement of Article 17 cannot be circumvented by reference to the Montreal Agreement of 1966").

Moreover, as the Court in recognized in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), in the draft provision of what is now Article 17, airline liability was narrowed to encompass only "bodily injury" caused by an accident. *Id.* at 173; *see Saks*, 470 U.S. at 401-03. Just as it was "improbable that, at the same time the drafters narrowed the conditions of air carrier liability in Article 17, they intended, in Article 24, to permit passengers to skirt those conditions by pursuing claims under local law" (*Tseng*, 525 U.S. at 173), it is improbable that the drafters intended to permit passengers to skirt those conditions by characterizing as an "accident" a passenger's harm caused by the conduct of another passenger.

Accordingly, to the extent that the decision of the court below stands for the proposition that a sexual assault by a passenger is an "accident" because it is a risk characteristic of air travel and, further, that recovery for a passenger's

random assault of another passenger can be premised upon the "virtual strict liability" created by the Montreal Agreement, the decision is contrary to the Court's decisions in *Saks* and *Tseng*.

III.

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE POST-RATIFICATION UNDERSTANDING OF THE MEANING OF "ACCIDENT" BY THE CONTRACTING PARTIES TO THE WARSAW CONVENTION

While the Court in *Saks* stated that its decision should be "flexibly" applied and repeated this admonition in *Tseng*, the Court did not intend to permit the lower courts to ignore the intent of the contracting parties and their understanding of what is or is not an "accident" within the scope of Article 17. Review is necessary, as the decision of the court below directly conflicts with the parties' post-1929 understanding of the meaning of "accident."

The Court has repeatedly stressed that in interpreting the Warsaw Convention, it is proper to refer to the records of its drafting and negotiation and the post-ratification understanding of the contracting parties. *See Tseng*, 525 U.S. at 167; *Zicherman v. Korean Air Lines*, 516 U.S. 217, 226 (1996); *Saks*, 470 U.S. at 400, 403.

The post-ratification conduct of the contracting parties to the Warsaw Convention from 1949 to as recently as May 1999 "clearly" confirms that the parties to the Convention, including the United States, consistently have considered that the term "accident" does *not* create air carrier liability for passenger-on-passenger assaults.

Shortly after the Warsaw Convention's entry into force, consideration was given by the Legal Committee of the International Civil Aviation Organization ("ICAO") to replace the Article 17 term "accident" with "occurrence" (as used in Article 18) (A 31a). At the ICAO Legal Committee's Fourth Session in Montreal in **1949**, the Committee decided to continue the distinction between "accident" in Article 17 and "occurrence" in Article 18:

> After considerable debate, the Sub-committee decided to make reference to "accident" only in para. (1) dealing with carriage of passengers, and to "occurrence" only in the case of the carriage of cargo or baggage. *It was agreed that the term "occurrence" would be too broad, as applicable to damage sustained in the event of the death of a passenger or any bodily injury suffered by him, as this expression would cover the case of independent action among the passengers such as an attack by one passenger upon another with consequent bodily injury to the latter.*

ICAO Legal Committee, *Minutes and Documents of the Fourth Session, Montreal, 7 June — 18 June 1949, Report of the Sub-Committee on the Revision of the Warsaw Convention*, ICAO Doc. 6027-LC/124 at 270 (1949) (emphasis added).

The question was again raised during the Twentieth Meeting of the Eighth Session of the ICAO Legal Committee in Madrid in **1951**. The Belgian Delegate proposed to substitute the word "occurrence" in order to broaden the liability of the air carrier. ICAO Legal Committee, *Minutes and Documents of the Eighth Session, Madrid, 11 September*

— *28 September 1951*, ICAO Doc. 7229-LC/133 at 136-138 (1951). Several of the delegates, including the Chairman of the U.S. delegation, Mr. Nunneley, opposed this change. *Id.* While the proposal was narrowly adopted, the circumstances were explained in detail in the Report of Mr. Nunneley:

> (1) *Nature of event for which carrier liable.* (References: Article 6(1), 1951 draft; Article 17, Warsaw Convention.) One change of substance from the existing Convention was effected by adoption by the Committee of the principle of making the carrier liable for death or injury resulting from an "occurrence" rather than from an "accident". The proponents of this change urged that liability should not be limited to instances where there had been an accident, but also should exist in other situations which resulted in injury or death. *Those opposing the substitution of "occurrence" for "accident", which included the United States, pointed out that thereby there would be included many situations in which there was no reason for imposing on the carrier the burden of being held liable unless it proved that it had taken all proper measures to avoid the accident,* since they would relate to matters not necessarily within the carrier's control. *The example of one passenger attacking another with resulting bodily injury was pointed out.* However, the vote by which the Committee approved "occurrence" was so small . . . that it seems clear that the vote was not representative, and this matter will have to be the subject of further consideration in the Committee. It is believed that further study should be directed to determining

> in some detail the extent to which the use of "occurrence" will in fact expand the situations in which a carrier will be presumed negligent.

Report of the U.S. Delegation to the Eighth Session of the Legal Committee of ICAO, Madrid, Spain, September 1951 at § (e)(1) (Emmory T. Nunneley, Jr., Chairman, U.S. Delegation), *excerpts reprinted in* 19 J.A.L.C. 70, 79 (1952) (emphasis added).

Then, at the Ninth Session of the ICAO Legal Committee in Rio de Janeiro in 1953, the Belgian Delegate reversed his position and advocated retention of the narrower term "accident." *See* ICAO Legal Committee, *Minutes of the Ninth Session, Rio de Janeiro, 25 August — 12 September 1953*, ICAO Doc. 7450-LC/136-1 at 71 (1954). The U.S. delegate, now Mr. Calkins, consistent with the view expressed by his predecessor, also advocated retention of the word "accident":

> *Mr. Calkins* (United States) said that one of the questions that his Delegation had the most doubt about in the Paris draft, was the substitution of the word "occurrence" for the word "accident". The danger in using the word "occurrence" was that this might possibly extend the liability of the carrier to cases for which liability did not now exist. To adopt the substitution would be a step in the dark and, therefore, his Delegation was opposed to this move. As to the example of failure of the pressurization, that would seem to be included within the word "accident". *However, his Delegation was afraid that an attack by one passenger against another might come within the*

> *Warsaw Convention, if the proposed change were made, and place liability where liability heretofore did not belong.*

Id. (emphasis added). The Committee voted to retain the term "accident." *Id.* at 71.

When the diplomatic conference was convened in 1955 at The Hague to consider what eventually became the Hague Protocol of 1955,[8] no changes were proposed to Article 17. Thus, the framers of the 1955 Hague Protocol did not wish to create carrier liability for passenger-on-passenger attacks.

It was not until the Guatemala City Protocol of 1971,[9] which was never ratified by the United States, that an amendment to Article 17 was approved that would impose liability on the carrier for an "event" rather than for an

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8. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929, Done at the Hague on 28 September 1955, 478 U.N.T.S. 371 (entered into force 1 August 1963). In November 1998, the United States ratified Montreal Protocol No. 4 ("MP4"), which binds the United States to the Hague Protocol as amended by MP4. MP4 came into force in the United States on March 4, 1999. *See* Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, Signed at Montreal on 25 September 1975, ICAO Doc. No. 9148 (entered into force 14 June 1998).

9. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, Signed at Guatemala City, on 8 March 1971 ICAO Doc. No. 8932 (not in force).

"accident." *See* ICAO, *Documents of the International Conference on Air Law, Guatemala City*, ICAO Doc. 9040-LC/167-2 at 189 (1972); *see Saks*, 470 U.S. at 403-04. While this switch was viewed as expanding the scope of carrier liability to passengers and creating a system of strict liability,[10] the Guatemala City Protocol of 1971 never came into force.

In fact, the anomalous use of "event" is meaningless since it is unlikely that the Guatemala City Protocol of 1971 ever will enter into force as ICAO recently adopted the Convention for the Unification of Certain Rules for Carriage by Air, signed at Montreal on 28 May **1999**, DCW Doc. No. 57 (ICAO) ("Montreal Convention"), which is intended to update and replace the "Warsaw System" of liability.[11]

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10. It is noteworthy that this change was not without objections. For example, the Italian delegate argued that the term "accident" be retained in order to make clear that liability arises only in the case of a "malfunction of service" or "abnormal event directly connected with air transport operations." Alternatively, he argued that language be included stating that a carrier is not liable if death/injury "result from an event unrelated to air transport operations." ICAO, *Minutes of the International Conference on Air Law, Guatemala City*, ICAO Doc. 9040-LC/167-1 at 32-33, 44, 47-48 (1972) (the example given to support this change was "a dispute between two passengers could arise on board the aircraft and result in injury to one or both"); *see also* Comments of Austria ("It is now suggested that the term "event" be substituted for the term "accident." This would mean that the air carrier would also be considered liable in the event, say, of a passenger killing another passenger on board the aircraft without that event having any relation to the service itself"). ICAO, *Documents of the International Conference on Air Law, Guatemala City*, ICAO Doc. 9040-LC/167-2 at 144 (1972).

11. While not yet in force, the Montreal Convention was recently transmitted to the U.S. Senate for advice and consent (Cont'd)

Article 17 of the Montreal Convention amends Article 17 to read as follows:

> 1. The carrier is liable for damage sustained in the case of the death or bodily injury of a passenger upon condition only that the *accident* which caused the death or bodily injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 17(1), Montreal Convention (emphasis added). Significantly, the term "accident" is in the Montreal Convention, as in the original Article 17.

If allowed to stand, the decision of the court below will perpetuate an interpretation of "accident" in direct conflict with the intent of the contracting states (*see Lahey v. Singapore Airlines, Ltd.*, 2000 U.S. Dist. LEXIS 14439 (S.D.N.Y. Oct. 5, 2000) (passenger injured by fellow passenger following a seating dispute is an accident under *Wallace*)) and in direct conflict with the interpretation of "accident" by the First Circuit (*see Langadinos*).

(Cont'd)
to ratification. *Message for the President of the United States Transmitting The Montreal Convention*, Treaty Doc. 106-45 (Sept. 6, 2000).

IV.

THIS IMPORTANT QUESTION OF FEDERAL TREATY LAW SHOULD BE SETTLED BY THE COURT SO THAT THE LOWER COURTS APPLY ARTICLE 17 CONSISTENTLY TO THE AIR CARRIERS OF THE WORLD OPERATING IN THE UNITED STATES

The meaning of the term "accident" and whether a passenger-on-passenger assault is an Article 17 "accident" where airline personnel played no causal role in the commission of the assault, involve important questions of federal law that will arise in every passenger case whether governed by the Warsaw Convention, the Convention as amended by Montreal Protocol No. 4 or the Montreal Convention of 1999. A threshold question that should be addressed by a court before liability can be imposed under any of these treaties is whether the airline caused the damage so sustained. The court below has created an anomaly out of step with decisions of other courts addressing liability for passenger assaults and out of step with the intent of the contracting parties as to the meaning of "accident."

The finding by the court below that a sexual assault is a risk of air travel also raises the practical considerations of how to protect passengers against this newly found hazard. The standard set forth by the court below ostensibly puts air carriers on notice that the courts bound by decisions of the Second Circuit will impose liability for damage sustained in Warsaw Convention transportation unless the air carrier segregates passengers according to gender (same sex assaults remain problematic), seat female passengers in aisle seats only, hire sufficient cabin crew to be able to provide constant

surveillance, eliminate closing of window shades during in-flight movies and fly with the interior lights illuminated at all times. A passenger-on-passenger assault was not the type of "risk" for which the drafters of the Convention intended to create liability. For this precise reason, the parties to the treaty have retained the language that the injury must be caused by an "accident" for over 70 years.

The Petition should be granted so that the Court may provide definitive guidance to the lower courts as to the proper application of the "accident" requirement under Article 17, to correct the lower court's manifest error, to avoid inconsistent interpretations of the Convention and to ensure that the Convention is applied by the lower courts in the manner intended by the contracting states.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JUNE 6, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1999

(Argued: December 1, 1999 Decided: JUN 6 2000)

Docket No. 99-7597

BRANDI WALLACE,

Plaintiff-Appellant,

– v. –

KOREAN AIR,

Defendant-Appellee.

Before: McLAUGHLIN, POOLER, SACK, *Circuit Judges*.

Brandi Wallace appeals from an order of the United States District Court for the Southern District of New York (Patterson, *J.*), granting Korean Air Lines Co., Ltd. summary judgment.

VACATED AND REMANDED.

Judge Pooler concurs by separate opinion.

* * *

McLAUGHLIN, *Circuit Judge*:

Plaintiff Brandi Wallace was sexually assaulted while on a Korean Air Lines Co., Ltd. ("KAL") international flight. Her attacker was a fellow passenger. She sued KAL to recover for the assault under the Warsaw Convention,[1] which makes air carriers liable for passenger injuries caused by an "accident." Warsaw Convention Art. 17. The United States District Court for the Southern District of New York (Patterson, *J.*) dismissed the suit, concluding that the sexual assault was not "a risk characteristic of air travel," and therefore was not an "accident" for purposes of the Convention. *Wallace v. Korean Air*, No. 98 Civ. 1039, 1999 WL 187213, at *4-5 (S.D.N.Y. Apr. 6, 1999). Because we disagree with that conclusion, we vacate and remand.

BACKGROUND

The facts are undisputed. On the evening of August 17, 1997, Brandi Wallace boarded KAL flight 61 in Seoul, Korea, destination Los Angeles, California. It being the middle of summer, Ms. Wallace wore a T-shirt and jean shorts with a belt. Initially, the flight passed uneventfully. Ms. Wallace was seated in a window seat in economy class, and fell asleep shortly after finishing her in-flight meal.

Two male passengers sat between Ms. Wallace's window seat and the aisle of the airliner's cabin. Seated closest to Ms. Wallace was Mr. Kwang-Yong Park. Before she fell

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1. Convention for the Unification of Certain Rules Relating to International Transportation by Air concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000, T.S. No. 876, *reprinted in* 49 U.S.C. § 40105.

asleep, Ms. Wallace had neither spoken to Mr. Park, nor given him the slightest indication that familiarity would be welcome. Nevertheless, about three hours into the flight, Ms. Wallace awoke in the darkened plane to find that Mr. Park had unbuckled her belt, unzipped and unbuttoned her jean shorts, and placed his hands into her underpants to fondle her. Ms. Wallace woke with a start and immediately turned her body toward the window causing Mr. Park to withdraw his hands. When Mr. Park resumed his unwelcome amours, however, Ms. Wallace recovered from her shock and hit him hard. She then climbed out of her chair and jumped over the sleeping man in the aisle seat to make her escape.

At the back of the plane, Ms. Wallace found a flight attendant and complained about the assault. The attendant reassigned her to another seat. When the plane arrived in Los Angeles, Ms. Wallace told airport police about the incident, and they arrested Mr. Park. He subsequently pled guilty in the United States District Court for the Central District of California to the crime of engaging in unwelcome sexual conduct with another person in violation of 18 U.S.C. § 2244(b).

In February 1998, Wallace brought this action against KAL in the United States District Court for the Southern District of New York (Patterson, *J.*), alleging that KAL was liable for Park's sexual assault under the Warsaw Convention, which applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention Art. 1(1).[2] As modified by the Montreal

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2. Wallace also asserted a common law claim for negligence. However, the district court dismissed that claim relying on *El Al*

(Cont'd)

Agreement,[3] the Warsaw Convention makes airlines liable (up to a $75,000 limit per passenger) "if *the accident* which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking" from an international air flight. Warsaw Convention Art. 17 (emphasis added); *see Shah v. Pan Am. World Servs., Inc.*, 148 F.3d 84, 92-93 (2d Cir. 1998).

Following discovery, Wallace moved for summary judgment on her Warsaw Convention claim. The district court denied the motion and dismissed that claim. Relying on its reading of *Air France v. Saks*, 470 U.S. 392 (1985), the district court reasoned that because the sexual assault was not "a risk characteristic of air travel," it therefore did not constitute an "accident" for purposes of the Warsaw Convention. *See Wallace*, 1999 WL 187213, at *4-5. Wallace now appeals.

DISCUSSION

The proper interpretation of the Warsaw Convention is an issue of law, which we review *de novo*. *See Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 167 (2d Cir. 1997).

(Cont'd)
Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 161 (1999) ("recovery for a personal injury suffered on board an aircraft or in the course of any of the operations of embarking or disembarking . . . if not allowed under the Convention, is not available at all.") (internal quotation marks, alteration and citation omitted). Wallace does not appeal that dismissal.

3. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 189900, approved, CAN Order No. E-23680, 31 Fed. Reg. 7302 (1966).

I

A brief history of the evolution of the liability regime fostered by the Warsaw Convention will help to elucidate the issue on this appeal. The Convention was drafted at two international conferences, the first in Paris in 1925, and the second in Warsaw in 1929. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 246 (1984); *see generally Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1467-69 (11th Cir. 1989) (reviewing history), *rev'd on other grounds*, 499 U.S. 530 (1991); *Saks v. Air France*, 724 F.2d 1383, 1385 (9th Cir. 1984) (same) *rev'd on other grounds* 470 U.S. 392 (1985). The United States became a signatory in 1934. *See* 78 Cong. Rec. 11,582 (1934); *Trans World*, 466 U.S. at 246-247.

The Convention had two goals: to establish uniform rules for international air travel and to limit potential carrier liability for passenger injuries so as not to frighten away potential investors from the fledgling air industry. *See Floyd*, 872 F.2d at 1467 (citing Andreas F. Lowenfeld and Allan I. Mendelsohn, *The United States and The Warsaw Convention*, 80 Harv. L. Rev. 497, 498-99 (1967) (other citations omitted)); *Saks*, 724 F.2d at 1385. To achieve these goals, the Convention capped the airlines' potential liability to each passenger at 125,000 gold french francs, or approximately $8,300. *See* Warsaw Convention Art. 22; *Floyd*, 872 F.2d at 1467. At the same time, however, the Convention made the airlines subject to Article 17, which provides in its entirety:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the

> damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 17 created what the courts have characterized as a "presumption" that air carriers are liable for passenger injuries. *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d 85, 87 (2d Cir. 1983); *see Floyd*, 872 F.2d at 1467 (same). There was a counterweight to the presumption: carriers could avoid Article 17 liability altogether by establishing the so-called "due care" defense provided by Article 20(1). *See* Warsaw Convention Art. 20(1) ("The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.").

From the beginning, the United States was hostile to the "stringent" limitations on liability imposed by the Convention. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 36 (2d Cir. 1975). In particular, the $8,300 liability cap was regarded as too stingy. *See Day*, 528 F.2d at 36. In November 1965, the United States announced its intention to withdraw from the Warsaw system if an international agreement could not be reached to raise the limits on liability. *See* 31 Fed. Reg. 7302 (1966); *Day*, 528 F.2d at 36. This notice of denunciation led to intense negotiations which ultimately culminated in the Montreal Agreement of 1966. Through that Agreement, the air carriers agreed to raise the limit of liability to $75,000 for flights originating, terminating, or having a stopping point in the United States. *See Floyd*, 872 F.2d at 1468 (citing Lowenfeld & Mendelsohn, 80 Harv. L. Rev. at 602). In addition, the carriers agreed to eliminate the "due care" defense they had enjoyed under Article 20. *See id.*

The rationale for the new regime was straightforward. In exchange for the cap on liability at the new level of $75,000, the air carriers consented to a system under which they assumed "virtual strict liability" for death or injury to passengers. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1485 (D.C. Cir. 1991). As Lowenfeld and Mendelsohn, who represented the United States at Montreal, explained, this arrangement made sense because: "[i]n terms of distribution of risk, the carrier would seem, in nearly every case, to be in the best position to . . . spread the risk most economically" regardless of fault. 80 Harv. L. Rev. at 599-600. In sum, a fundamental reason for the abandonment of the fault-based "due care" defense available under the Warsaw Convention was to guarantee to passengers the prospect of quicker and less expensive settlements. *See id.* at 600.

II

The essential predicate of carrier liability is the occurrence of an "accident" contemplated by Article 17 of the Convention. The issue presented here is whether Park's sexual molestation of Ms. Wallace constituted such an "accident." We hold that it did.

A. *Saks*

Although the Convention itself does not define an "accident," the Supreme Court addressed the meaning of that term in *Air France v. Saks*, 470 U.S. 392 (1985). There, Valerie Saks sued an airline because she became deaf as a result of changes in air pressure during a flight. After extensive discovery established that the aircraft's pressurization system had operated in the usual manner, the

district court dismissed the case, holding that Saks could not recover under the Convention without evidence of some malfunction in the aircraft's operation. *See Saks*, 724 F.2d at 1384 (summarizing district court holding).

On appeal, the Ninth Circuit rejected this rationale, "hold[ing] that a showing of a malfunction or abnormality in the aircraft's operation is not a prerequisite for liability under the Warsaw Convention." *Saks*, 724 F.2d at 1384. Reviewing the history of the Convention, the circuit court emphasized that the air carriers had surrendered their due care defense when they entered into the Montreal Agreement. *See id.* at 1385-87. This contractual modification, the court reasoned, imposed "absolute liability [on the air carriers] for injuries proximately caused by the risks inherent in air travel." *Id.* at 1384. Applying this standard of absolute liability, the Ninth Circuit found that the normal pressurization changes that caused Saks's deafness constituted an Article 17 "accident."

The Ninth Circuit recognized that its absolute liability approach differed from the approach adopted by the Third Circuit. *See id.* at 1388 (citing *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1196 (3rd Cir. 1978) ("If the event on board an airplane is an ordinary, expected, and usual occurrence, then it cannot be termed an accident. To constitute an accident, the occurrence on board the aircraft must be . . . an unusual or unexpected happening."); *Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400, 412-413 (E.D. Pa. 1977) (normal cabin pressure changes are not "accidents" within the meaning of Article 17)).

The Supreme Court granted certiorari to resolve the circuit split. *See Air France v. Saks*, 470 U.S. 392, 394

(1985). According to the Court, "the narrow issue presented" was whether Saks could prove an "accident" for purposes of the Convention "by showing that her injury was caused by the normal operation of the aircraft's pressurization system." *Saks*, 470 U.S. at 396. The Court's answer to that question was no.

The Court rejected as "not entirely accurate" the Ninth Circuit's characterization of the Montreal Agreement as imposing "absolute" liability on air carriers. *Id.* at 407. While acknowledging that the carriers had waived their due care defense by entering the Montreal Agreement, the Court pointed out that "[t]hey did not waive other provisions in the Convention that operate to qualify liability, such as . . . the 'accident' requirement of Article 17." *Id.*

In addressing what constitutes an "accident," the Supreme Court essentially adopted the Third Circuit's language, defining the term as an injury "caused by an unexpected or unusual event or happening that is external to the passenger." *Id.* at 405. The Court announced that "[t]his definition should be flexibly applied" and, as examples, cited with approval to "lower courts in this country [that] have interpreted Article 17 broadly enough to encompass torts committed by terrorists or fellow passengers." *Id.* (citing cases). With respect to Saks herself, however, the Court concluded that no accident had occurred because her deafness indisputably resulted from her own "internal reaction to the usual, normal, and expected operation of the aircraft." This was no "accident." *Id.* at 406.

B. *The Instant Case*

Courts have wrestled with the *Saks* definition of "accident" since it was announced. That struggle is particularly difficult in cases like ours where the putative injuries are caused by torts committed by fellow passengers.

In one camp, courts hold that an "accident" under Article 17 must arise from "such risks that are characteristic of air travel." *Stone v. Continental Airlines, Inc.*, 905 F. Supp. 823, 827 (D. Haw. 1995) (injury caused by being punched without provocation by another passenger not an accident because it was not "derived from air travel"); (quoting *Price v. British Airways*, No. 91 Civ. 4947, 23 Av. Cas. 18465, 1992 WL 170679, at *3 (S.D.N.Y. July 6, 1992) (injury caused by a fistfight between two passengers not an "accident" because "a fracas is not a characteristic risk of air travel nor may carriers easily guard against such a risk through the employment of protective security measures.")); *see Curley v. American Airlines, Inc.*, 846 F. Supp. 280, 283 (S.D.N.Y. 1994) (same standard).

Another camp has cast a wider net. For example, in *Barratt v. Trinidad & Tobago (BWIA Int'l) Airways Corp.*, No. CV 88-3945, 1990 WL 127590 (E.D.N.Y. Aug. 28, 1990), the court rejected the contention that a stumble and fall inside an airline terminal could never come within the scope of Article 17 because such an accident is not caused by a risk inherent in aviation. The court reasoned:

> In *Air France v. Saks*, 470 U.S. 392, 405 (1985), the Supreme Court held that an "accident," for purposes of Article 17, is an injury caused by "an unexpected or unusual event or happening that is

> external to the passenger." This definition is in no way limited to those injuries resulting from dangers exclusive to aviation. [Article 17] itself limits liability for accidents, not by reference to risks inherent in aviation, but by whether they occur "on board the aircraft or in the course of any of the operations of embarking or disembarking."

Barratt, 1990 WL 127590 at *2. Obviously, under this reading of *Saks*, an airline presumably would be liable for all passenger injuries, including those caused by co-passenger torts, regardless of whether they arose from a characteristic risk of air travel.

This Circuit has yet to choose definitively between these competing interpretations of the term "accident." The issue is not an easy one, for as one of our sister circuits has noted, the *Saks* opinion does not make it "clear whether an event's relationship to the operation of an aircraft is relevant to whether the event is an 'accident.' " *Gezzi v. British Airways PLC*, 991 F.2d 603, 605 n.4 (9th Cir. 1993). To be sure, in the lower court cases cited with approval in *Saks*, all the passenger injuries seem to have arisen out of risks that are inherent to air travel, or out of the operation of the aircraft itself. *See Saks*, 470 U.S. at 405 (citing *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3rd Cir. 1977) (*en banc*) (terrorist attack); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975) (same); *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975) (hijacking); *Oliver v. Scandinavian Airlines Sys.*, 17 CCH Av. Cas. 18,283 (D. Md. 1983) (drunken passenger who was continually served alcohol fell and injured fellow passenger)). Despite these citations, however, the *Saks* court did not address

whether an event must relate to air travel to be an Article 17 "accident." Instead, the *Saks* opinion expressly limited itself to the "*narrow issue*" of whether the "*normal*" (as opposed to abnormal) operation of an aircraft could give rise to an "accident."[4] *Saks*, 470 U.S. at 396 (emphasis added).

Happily, this Talmudic debate is academic in the unique circumstances of this case. Indeed, we have no occasion to decide whether all co-passenger torts are necessarily accidents for purposes of the Convention. This is so because we conclude that an Article 17 "accident" occurred here even under the narrower characteristic risk of air travel approach. Though a close question, we reach that conclusion mindful of the "virtual strict liability" imposed on air carriers by the Warsaw regime, *In re Korean Air Lines*, 932 F.2d at 1485, and in deference to the *Saks* Court's admonition to interpret the term "accident" both "flexibly" and "broadly." 470 U.S. at 405.

Turning to the particular facts that give rise to an "accident" in this case, it is plain that the characteristics of air travel increased Ms. Wallace's vulnerability to Mr. Park's assault. When Ms. Wallace took her seat in economy class on the KAL flight, she was cramped into a confined space beside two men she did not know, one of whom turned out

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4. This language, which expressly limits the scope of the Court's holding, clearly was chosen carefully. As Humpty Dumpty explained to Alice: "When I use a word . . . it means just what I choose it to mean — neither more nor less." Lewis Carroll, *Through the Looking-Glass* ch. 6 at 106-09 (Schocken Books 1987) (1872). Thus, while we share our concurring colleague's preference for simplicity, we cannot agree that *Saks* resolved ("implicitly" or otherwise) the issue of whether all co-passenger torts must be "accidents." Neither do we see any need to address that issue today.

to be a sexual predator. The lights were turned down and the sexual predator was left unsupervised in the dark. It was then that the attack occurred.

Equally important was the manner in which Mr. Park was able to carry out his assault. While Ms. Wallace lay sleeping, Mr. Park: (1) unbuckled her belt; (2) unbuttoned her shorts; (3) unzipped her shorts; and (4) squeezed his hands into her underpants. These could not have been five-second procedures even for the nimblest of fingers. Nor could they have been entirely inconspicuous. Yet it is undisputed that for the entire duration of Mr. Park's attack not a single flight attendant noticed a problem. And it is not without significance that when Ms. Wallace woke up, she could not get away immediately, but had to endure another of Mr. Park's advances before clambering out to the aisle.

In sum, recognizing the flexibility called for by *Saks*, we are satisfied that Mr. Park's assault on Ms. Wallace was, in the language of *Saks*, "an unexpected or unusual event or happening that [was] external to the passenger." 470 U.S. at 405. As such, it constituted an "accident" for purposes of Article 17 of the Warsaw Convention.

CONCLUSION

The district court's decision that Mr. Park's assault of Ms. Wallace did not constitute an "accident" under Article 17 of the Convention is VACATED and this case is REMANDED for further proceedings. We express no opinion on any other aspect of Ms. Wallace's Warsaw Convention claim.

POOLER, *Circuit Judge*, concurring:

I concur in the result and in the majority's able discussion of the Warsaw Convention, but I write separately because I would decide the case on a ground the majority avoids. At issue in this case is whether a tort committed by a fellow passenger constitutes an "accident" under Article 17 of the Warsaw Convention. The district court dismissed the case holding that airlines are only "liable for torts that are proximately caused by the abnormal or unexpected operation of the aircraft . . . the abnormal or unexpected conduct of airline personnel," or that involve "a risk characteristic of air travel." *Wallace v. Korean Air*, No. 98 Civ. 1039, 1999 WL 187213 *4 (S.D.N.Y. Apr. 6, 1999). The majority now reverses, assuming without deciding that the district court's interpretation of "accident" was correct, but holding that the sexual assault Wallace suffered met that definition — a factual issue neither briefed nor argued by counsel. I would reverse in more straightforward fashion, because I believe that the lower court's holding contradicts Supreme Court precedent. We need not reach the complicated, always fact laden, and irrelevant question of what constitutes a risk characteristic of air travel.[1]

Imposing an "inherent in air travel" requirement does not comport with the plain meaning of the Supreme Court's decision in *Air France v. Saks*, 470 U.S. 392 (1985).

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1. For example, one might argue that being strapped into one's seat next to a stranger is not so much a characteristic of air travel as it is a characteristic of any form of public transportation. If we adopt, even provisionally, the district court's approach, an even more "Talmudic" question arises than the one the majority avoids: how associated with air travel need a hazard be before it can fairly be described as "characteristic"?

A co-passenger's tort satisfies the Supreme Court's interpretation of "accident" as "an unexpected or unusual event or happening that is external to the passenger," and the Court did not also include a "characteristic of air travel" requirement in the definition. *See Saks*, 470 U.S. at 405. Although the Court stated that its definition should "be flexibly applied," *id.*, the Court did not thereby authorize courts to add more hurdles for a plaintiff to overcome. Rather, the Court approved lower court decisions that had already read Article 17 "broadly enough to encompass torts committed by terrorists or fellow passengers." *Id.* (citing cases). When the Supreme Court partially restated its holding, it again avoided any mention of the inherent risks of air travel: "[a]ny injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger." *Id.* at 406. What the Court left to district courts to decide is "whether an 'accident' as here defined caused the passenger's injury." *Id.* The majority mistakes this for an invitation to decide what is an accident.

The context of the Court's holding in *Saks* also supports the view that "characteristic of air travel" is not a necessary element of an Article 17 accident. Valerie Saks's unfortunate left-ear deafness was caused by the normal operation of the airplane pressurization system. Article 17 of the Warsaw Convention makes air carriers liable for injuries sustained by a passenger, "if the accident which caused the damage so sustained took place on board the aircraft . . . ." At the district court, Air France argued that "accident" means an "abnormal, unusual or unexpected occurrence" aboard the aircraft. *See Saks*, 470 U.S. at 395. Ms. Saks argued for a "hazard of air travel" definition. *See id.* The district court agreed with Air France. The Ninth Circuit disagreed and concluded that

absolute liability attached "for injuries proximately caused by the risks inherent in air travel." *Saks v. Air France*, 724 F.2d 1383, 1384 (9th Cir. 1984) *rev'd* 470 U.S. 392 (1985).

I recite this history to put in context the two competing constructions the Court had before it when it held, "We conclude that liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or usual event or happening that is external to the passenger." *Saks*, 470 U.S., at 405. The Court adopted the view advanced by Air France at the district court and rejected the view advanced by Ms. Saks — the "inherent in air travel" view. Conspicuously absent from the Court's decision is language concerning air travel and its inherent risks. Nonetheless, the district court in this case saw fit to engraft an "inherent in air travel" requirement into the *Saks* test when it dismissed Ms. Wallace's claim. The majority, like the district court, fails to recognize that the Supreme Court has already implicitly rejected that interpretation.

The majority concludes that we need not reach the interpretation of "accident," and that we should not do so. I disagree, because I believe the Supreme Court has spoken to the issue and resolved it. We, therefore, have an obligation to address the Supreme Court's interpretation of Article 17. *Saks* is the law as explained to us by the Court, and it is our duty to implement the Court's articulation of Article 17, not the district court's. This duty looms especially large since other courts have misinterpreted Article 17 and *Saks*. In the instant case, the district court's addition of a prong to the definition demonstrates the need for a clearly understood rule in our circuit. Our decision today will leave district courts wondering what to do in future cases with respect to a question the Supreme Court has already answered.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 5, 1999 AND FILED APRIL 6, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

98 Civ. 1039 (RPP)

BRANDI WALLACE,

Plaintiff,

– against –

KOREAN AIR,

Defendant.

OPINION AND ORDER

* * *

ROBERT P. PATTERSON, JR., U.S.D.J.

Plaintiff Brandi Wallace ("Wallace") has brought suit against defendant Korean Air alleging that it is liable for a sexual assault[1] she sustained during an international flight

1. Plaintiff claims that she was subjected to unwelcome sexual contact, which would constitute a battery under New York civil law. *See United Nat'l Ins. v. Waterfront New York Realty Corp.*, 994 F.2d 105, 108 (2d Cir. 1993); *Pope v. State*, 192 Misc. 587, 593, 79 N.Y.S.2d 466, 471 (Ct. Cl. 1948), *aff'd*, 277 A.D. 1015, 99 N.Y.S.2d 1019 (1950).

under the common law of negligence and under the Warsaw Convention,[2] as modified by the Montreal Agreement.[3] Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff has moved for partial summary judgment on the issue of defendant's liability under the Warsaw Convention. For the reasons that follow, plaintiff's motion is denied and its claim under the Warsaw Convention is dismissed.

FACTUAL BACKGROUND

On August 17, 1997, plaintiff was a passenger on Korean Air Flight 61 from Seoul, Korea to Los Angeles, California (Plaintiff's Statement of Facts (hereinafter "Pl.'s 56.1 Statement") ¶¶ 2-3; Defendant's Rule 56.1 Statement of Material Facts as to Which There is no Genuine Issue to be Tried (hereinafter "Def.'s 56.1 Statement") ¶ 1). Plaintiff was seated in seat 43K, a window seat, and slept during the flight (Def.'s 56.1 Statement ¶¶ 2, 10; Deposition of Brandi Wallace (hereinafter "Wallace Dep.")[4] at 10, 16). Plaintiff awoke to find that Kwang-Yong Park ("Park"), the passenger in the adjacent seat, 43J, had unbuckled plaintiff's belt, unbuttoned and unzipped her shorts, and placed his hand in plaintiff's underwear to fondle her genitals (Wallace Dep. at 20-21; Affidavit of Brandi Wallace (hereinafter "Wallace

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2. Convention for the Unification of Certain Rules to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, note following 49 U.S.C.A. § 40105 (1997).

3. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol Agreement CAB 18900, approved by Executive Order No. 23,680, 31 Fed. Reg. 7302 (1966).

4. The Wallace Deposition has been submitted to the Court as Exhibit A to the Affidavit of George N. Tompkins, III.

Aff.")[5] ¶¶ 3-4). Prior to this incident, Park had neither spoken to plaintiff nor given plaintiff any indication that unwelcome sexual conduct was likely to occur, and plaintiff did not complaint to Korean Air attendants about Park at any time before the accident occurred (Wallace Dep. at 15-17, 37-39).

Park subsequently pleaded guilty to the crime of engaging in sexual conduct with another person without that person's permission, in violation of 18 U.S.C. § 2244(b), and he was sentenced to two years probation by the United States District Court for the Central District of California (Pl.'s 56.1 Statement, Ex. 2).

Plaintiff initiated this action against Korean Air by filing a complaint on February 13, 1998. Plaintiff filed the present motion for partial summary judgment on June 22, 1998.

DISCUSSION

A. *Standard for Granting Summary Judgment:*

Summary judgement is appropriate when "there is no genuine issue of material fact to be tried and the facts as to which there is no issue warrant judgment for the moving party as a matter of law." *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2d Cir. 1994); Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The interpretation of an international treaty such as the Warsaw Convention is an issue of law which can be resolved on summary judgment. *See CPH Int'l, Inc. v. Phoenix Assurance Co.*, No. 92 Civ. 2729 (SS) (NRB), 1994

5. The Wallace Affidavit has been submitted to the Court as Exhibit 1 to the Affidavit of Frank H. Granito, III.

WL 259810, at *17 n.3 (S.D.N.Y. June 9, 1994); *Upton v. Iran Nat'l Airlines Corp.*, 450 F. Supp. 176, 178 (S.D.N.Y. 1978), *aff'd without opinion*, 603 F.2d 215 (2d Cir. 1979).

B. *Applicable Law*

Plaintiff's first cause action, on which she seeks summary judgment, is governed by the Warsaw Convention since plaintiff was in the course of international transportation by air as required by Article 1(1), and as defined by Article 1(2), of the Warsaw Convention.[6] The circumstances under which an air carrier may be liable to passengers on international flights are set forth by Article 17 of the Warsaw Convention:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. at 3018. In other words, a passenger seeking to hold a carrier liable for injury must establish that (1) there has been an accident in which (2) the passenger suffered death, wounding or bodily injury, and (3) the accident took place on board the aircraft or in the course of operations of

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6. Article 1(1) states that the Convention applies "to all international transportation of person, baggage, or goods performed by aircraft for hire." 49 Stat. at 3014. Article 1(2) states that "international transportation" includes any transportation in which "the place of departure and the place of destination . . . are situated . . . within the territories of two High Contracting Parties." *Id.*

embarking or disembarking. *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535-36 (1991).

Since defendant does not dispute that plaintiff was molested by a fellow passenger while asleep on board its aircraft, the issue to be resolved is whether the molestation which caused plaintiff's injury is an "accident" giving rise to liability under Article 17 of the Warsaw Convention.

In *Air France v. Saks*, the Supreme Court provided a flexible definition of the term "accident" and concluded:

> [L]iability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries.

470 U.S. 392, 405 (1985). The Court rejected the position of the Court of Appeals for the Ninth Circuit that the Warsaw Convention, as amended by the Montreal Agreement, imposes absolute liability on airlines for all injuries proximately cause by the risks inherent in air travel. *See id.* at 396. Because the "narrow issue presented" was framed by plaintiff's injury, permanent deafness in her left ear caused by the normal operation of the flight, *see id.* at 394, 396, the Court in *Saks* held only that "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention does not apply." *Id.* at 406.

The Supreme Court observed, without disapproval, that "lower courts in this country have interpreted Article 17 broadly enough to encompass torts committed by terrorists or fellow passengers." 470 U.S. at 405. However, because it stated that the definition of "accident" "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries," *id.*, the Court did not endorse a *per se* rule of air carrier liability for the torts of fellow passengers. In *El Al Israel Airlines, Ltd. v. Tseng*, the Court ruled that the plaintiff could not maintain an action for personal injury under local law when her claim did not satisfy the conditions for liability under the Warsaw Convention, but it reiterated, in a lengthy footnote, that the definition of "accident" set forth in *Saks* should be flexibly applied. 119 S. Ct. 662, 670 n.9 (1999). Accordingly, the fact that a sexual molestation on an airplane is "an unexpected or unusual event" and a "tort by a fellow passenger" does not foreclose inquiry into the circumstances surrounding plaintiff's injuries to determine whether it is appropriate to find that plaintiff was the victim of an "accident" within the meaning of the Warsaw Convention.

In the lower court rulings cited by the Supreme Court in *Saks* as cases interpreting Article 17 to include torts by fellow passengers, the injuries arose out of the failures of air carriers to provide protection for recognized dangers to air passengers. *See Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3rd Cir. 1977) (terrorist attack); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2nd Cir. 1975) (en banc) (same), *cert. denied*, 429 U.S. 890 (1976); *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975) (hijacking); *Oliver v. Scandinavian Airlines Sys.*, 17 CCH Av. Cas. 18,283 (D. Md. 1983) (drunken passenger fell and injured fellow passenger). Terrorism and hijacking are,

unfortunately, recognized risks associated with air travel. *See Curley v. American Airlines, Inc.*, 846 F. Supp. 280, 283 (S.D.N.Y. 1994) ("On the theory that hijackings and terrorist attacks are risks characteristic of air travel, liability under the Convention has been expanded to include injuries resulting from such attacks."); *Price v. British Airways*, No. 91 Civ. 4947 (JFK), 1992 WL 170679, at *3 (S.D.N.Y. July 7, 1992) ("[T]he fundamental premise relied upon by the courts to expand carrier liability to include hijackings and terrorist attacks is that such risks are characteristic of air travel."). The only case cited by the Supreme Court that did not involve a terrorist attack or hijacking, *Oliver v. Scandinavian Airlines System*, dealt with an intoxicated passenger who had been served drinks by the defendant air carrier and who subsequently fell and injured a fellow passenger. 17 CCH Av. Cas. 18,283, 18,284 (D. Md. 1983) (noting, though with little elaboration of the facts, that the "cause" of the accident was the continued availability of alcohol on the plane).

Subsequent to *Saks*, lower courts have reaffirmed that terrorist acts and hijacking constitute accidents under Article 17, *see, e.g.*, *Pflug v. Egyptair Corp.*, 961 F.2d 26, 29 (2d Cir. 1992), and found liability in cases where the operation of the aircraft or acts or omissions by airline personnel have furthered injuries by fellow passengers, *see, e.g.*, *Tsevas v. Delta Air Lines, Inc.*, No. 97 C. 0320, 1997 WL 767278, at *3-*4 (N.D. Ill. Dec. 1, 1997) (carrier held liable for sexual assault caused in part by continued service of alcohol to drunken passenger and deliberate refusal of flight attendants to respond to requests for help); *Schneider v. Swiss Air Transp. Co.*, 686 F. Supp. 15, 17 (D. Me. 1988) (carrier held liable for injury caused by full recline of fellow passenger's seat when plaintiff sought and was denied

assistance by airline's personnel). Courts have focused on whether the cause of injury is "a characteristic risk of air travel," *Curley*, 846 F. Supp. at 293, or whether it bears a "relation to Defendant's operation of the aircraft," *Price*, 1992 WL 170679, at *3. In *Curley*, "the highly unusual happenstance" of being detained and searched by Mexican authorities after being identified, allegedly falsely, by the plane captain as smoking marijuana in the airplane lavatory was found to be "hardly a characteristic risk of air travel," and not an "accident" within the meaning of Article 17. 846 F. Supp. at 283. In *Price*, a passenger exchanged words with another passenger in the rear of the aircraft and subsequently was punched in the face and suffered a bloody nose; the court reasoned that "[s]uch a fracas is not a characteristic risk of air travel nor may carriers easily guard against such a risk through the employment of protective security measures," and found that the incident was not an "accident." 1992 WL 170679, at *3. Similar injuries unrelated to the foreseeable risks of air travel and unrelated to the operation of aircraft have likewise been found to fall outside the scope of Article 17. *See, e.g.*, *Stone v. Continental Airlines, Inc.*, 905 F. Supp. 823, 827 (D. Haw. 1995) (plaintiff punched by fellow passenger); *Pitman v. Grayson*, 869 F. Supp. 1065, 1071 (S.D.N.Y. 1994) (airline personnel assisted smuggling of plaintiff's minor child who was subject of custody dispute); *Levy v. American Airlines*, No. 90 Civ. 7005 (LJF), 1993 WL 205857, at *4 (S.D.N.Y. June 9, 1993) (plaintiff suffered injuries at hands of Drug Enforcement Administration agents in course of his extradition from Egypt on narcotics charges), *aff'd*, 22 F.3d 1092 (2d Cir. 1994).

In other cases where the air carrier has facilitated a tort by a fellow passenger, or committed a tort itself, courts have held that such conduct is an "unexpected event" falling within

the *Saks* definition of an "accident." *Tsevas*, 1997 WL 767278, at *3 (continued service of alcohol to plaintiff's assailant and refusal to change plaintiff's seat); *see also Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 143 (2d Cir. 1998) (scalding injuries suffered when stewardess applied hot compress to relieve earache "in a way (using excessive, scalding water) that was not expected, usual, normal, or routine"); *Laor v. Air France*, 31 F. Supp. 2d 347, 350 (S.D.N.Y. 1998) (injuries caused by attendant's forcing open door of lavatory occupied by plaintiff in response to smoke alarm sounded in lavatory found to be produced by "accident" because "a smoke alarm does not routinely sound during the operation of an aircraft" and "[t]he opening of a locked lavatory door cannot be described as anything other than 'unexpected and unusual' "); *Waxman v. C.I.S. Mexicana De Aviacion, S.A. de C.V.*, 13 F. Supp. 2d 508, 512 (S.D.N.Y. 1998) (airline's failure to remove hypodermic needle from seat cushion "may safely be viewed as an unusual, unexpected departure from ordinary procedures" and resultant injury "is properly deemed to have resulted from an 'accident' "). These cases rest on the same theory as the *Oliver* case cited by the Supreme Court in *Saks* — that is, that air carriers should be liable for torts that are proximately caused by the abnormal or unexpected operation of the aircraft or the abnormal or unexpected conduct of airline personnel.

C. *Application of Article 17 to Plaintiff's Claim*

In this case, there was no act or omission by the aircraft or airline personnel representing a departure from the normal, expected operation of a flight. Plaintiff testified that prior to falling asleep and being sexually molested, she did not speak with Park, her assailant, was not touched by him in an

offensive manner, and did not complain about him to Korean Air personnel or anyone else (Wallace Dep. at 15-17, 37). There is no evidence that defendant had served Park sufficient alcohol to make him drunk.[7] Plaintiff stated that prior to falling asleep, she had no indication that Park was going to molest her, and felt no cause to be concerned for her safety (*id.* 38-39). After plaintiff was molested, she complained to a Korean Air crew member and he immediately reassigned her to a new seat (*id.* 26). The record reveals no act or omission by defendant which had any connection to plaintiff's injuries and which might lead to a finding that plaintiff's injuries were the result of an "accident" within the meaning of Article 17.[8] *Cf. Tsevas*, 1997 WL 767278, at *3-4 (sexual assault by fellow passenger does constitute "accident" when flight crew not only continued to serve

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7. Plaintiff testified that prior to the meal served one hour after take-off, Park had one glass of wine, and that "through the meal I think he had two glasses of wine" (Wallace Dep. at 14). Plaintiff was sexually molested two-and-a-half to three hours after take off (*id.* at 13). Plaintiff did not testify that Park was drunk when he molested her (*id.* at 42).

8. In her complaint, plaintiff stated on information and belief that after she boarded the flight but before the flight took off, Park was instructed by the cabin crew to change seats and was given a seat next to plaintiff's (Compl. ¶ 8). However, plaintiff testified to the contrary in her deposition, stating that when she boarded the flight and arrived at her seat, Park was already sitting there (Wallace Dep. at 10-12), and neither her affidavit nor her 56.1 Statement resurrect the claim that defendant's crew asked Park to change seats. In any case, because there is no evidence that defendant (or anyone else) had any reason to be suspicious of Park, any seat reassignment would represent the expected, normal, and routine practice of airline operation, reasonably carried out, rather than an "accident" within the meaning of Article 17.

assailant alcohol after plaintiff complained that assailant was drunk, but also refused to move plaintiff when she complained about assailant's unwanted advances).

Moreover, sexual molestation such as that alleged by plaintiff is not a risk characteristic of air travel or related to the operation of an airplane, and air carriers are not in a special position to develop defensive measures or insure against such incidents. *Cf. Gotz*, 12 F. Supp. 2d at 204 ("An event cannot fall within the operation of the aircraft if that event is not within the airline's purview or control."); *Price*, 1992 WL 170679, at *3 (contrasting fistfight between passengers to terrorist attacks and hijackings, which are "risks characteristic of air travel" against which "carriers are in the best position to guard").

Finally, plaintiff's argument that airlines are subject to absolute liability on the basis of the Montreal Agreement is inconsistent with *Saks* and must be rejected. As stated in *Saks*, "Our duty to enforce the 'accident' requirement of Article 17 cannot be circumvented by reference to the Montreal Agreement of 1966." 470 U.S. at 406. While the parties to the Montreal Agreement consented to the waiver of "due care" defenses under Article 20(1) of the Warsaw Convention, "they did not waive other provisions in the Convention that operate to qualify liability, such as . . . the 'accident' requirement of Article 17." *Id.* at 407.

Plaintiff's misfortune may have occurred on defendant's airplane, but an assessment of the circumstances surrounding her injuries shows that they did not result from an "accident" within the meaning of Article 17 of the Warsaw Convention.

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment is denied. Because defendant requested dismissal of the complaint (Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment at 3, 9) and plaintiff did not oppose this request except by contesting defendant's interpretation of the Warsaw Convention, and because there are no genuine issues of material fact barring dismissal, plaintiff's first cause of action based on the Warsaw Convention is dismissed. The parties may, if they choose, submit briefs to the Court addressing the impact of the Supreme Court's recent decision in *El Al Israel Airlines, Ltd. v. Tseng*, 119 S. Ct. 662 (1999), upon plaintiff's remaining cause of action. If no brief is received from plaintiff by April 25, 1999, plaintiff's remaining claim will be dismissed and this case will be closed.

IT IS SO ORDERED.

Dated: New York, New York
April 5, 1999

s/ Robert P. Patterson, Jr.
Robert P. Patterson, Jr.
U.S.D.J.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 12, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12 day of July two thousand.

Dkt No: 99-7597

Wallace

Plaintiff-Appellant,

v

Korean Air

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Korean Air.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

RELEVANT PROVISIONS OF THE WARSAW CONVENTION OF 1929

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 18(1)

The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

49 Stat. 3019.

Article 20(1)

The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

49 Stat. 3019.

EXCERPTS FROM BRIEF FOR PLAINTIFF-APPELLANT

99-7597

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRANDI WALLACE,

Plaintiff-Appellant,

– against –

KOREAN AIR,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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* * *

[page 2] . . . Mr. Park was arrested upon the flight's arrival in Los Angeles, and he subsequently pled guilty to the crime of engaging in sexual conduct without another person's permission, in violation of 18 U.S.C. § 2244(b).

B. THE NATURE OF THE CASE

Because the flight involved "international transportation," plaintiff claims the air carrier's liability attaches under Article 17 of the Warsaw Convention,[2] as modified by the Montreal Agreement.[3] Plaintiff does not contend that any acts or omissions of defendant Korean Air ("KAL") caused or contributed to the sexual assault on board Flight 61.

Under Article 17,[4] an air carrier is liable for passenger injury when three conditions are established: (1) there has been an accident, in which (2) passenger death, wounding or other bodily injury, has occurred (3) on board the aircraft or in the course of embarkation or disembarkation. In exchange for this liberal standard of liability, the air carrier's monetary exposure for death or injury resulting from an Article 17 "accident" cannot exceed $75,000 (the limit set by the Montreal Agreement), absent the airline's wilful misconduct.

* * *

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2. Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000 T.S. No. 876, 137 L.N.T.S. (1934), reprinted in 49 U.S.C. §40105 (1997) (Note).

3. Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900, 31 Fed. Reg. 7302 (1966), note following 49 U.S.C. App. §1502.

4. Copy attached as Addendum A.

[page 12] . . . 1256 (9th Cir. 1977), *cert. denied*, 431 U.S. 974 (1977); *Evangelinos v. TWA*, 550 F.2d 152 (3d Cir. 1977). *See also* CAB Press Release 66-61; 382-6031, May 3, 1966 ("[B]y agreeing to forego certain defenses which they could raise under the terms of the Convention, the participating carriers are accepting the principle of absolute liability, i.e., liability without fault on the part of the airline.")[9]

If Article 20(1) of the Convention were an available defense in this case, the position of the defendant and the court below might have merit. This is because plaintiff concedes the assault was not caused by a lack of due care on the part of defendant. But KAL waived these "due care" defenses when it became a signatory to the Montreal Agreement. As such, it may only avoid absolute liability in this case if the damage suffered by Ms. Wallace was a result of her own "internal reaction to the usual, normal and expected operation of the aircraft." *Saks*, 470 U.S. at 405-06.

While it is true that the Montreal Agreement does not change the definition of an Article 17 "accident" (*Saks*, 470 U.S. at 406-07), it is equally true that a court . . . .

* * * *

9. The State Department press release announcing the Montreal Agreement similarly remarked: "Airlines in international travel will be absolutely liable up to $75,000.00 per passenger regardless of any fault or negligence. Recovery by those who need it most will thus be maximized and expedited." Department of State Press Release No. 110, May 13, 1966. *See also Windbourne v. Eastern Air Lines, Inc.*, 479 F.Supp. 1130 (E.D.N.Y. 1979), *rev'd on other grounds*, 632 F.2d 219 (2d Cir. 1980).

Supreme Court, U.S.
FILED
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No. 00-560

IN THE

Supreme Court of the United States

KOREAN AIR LINES CO., LTD.,

Petitioner,

v.

BRANDI WALLACE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can a passenger's sexual assault of another passenger in an adjacent seat on board the aircraft constitute an "accident" within the meaning of Article 17 of the Warsaw Convention despite the absence of a causal role on the part of the air carrier?

Respondent Brandi Wallace respectfully requests that the petition for a writ of certiorari filed in this case on behalf of Korean Air Lines Co., Ltd. (KAL) be denied. By letter dated November 21, 2000, the Clerk of this Court (Hon. William K. Suter), requested that a response to the Petition be filed by Respondent.[1]

STATEMENT OF THE CASE

Proceedings Below

Respondent Brandi Wallace was the victim of a sexual assault, committed by a co-passenger, while on board KAL Flight 61 on August 17, 1997. Under Article 17 of the Warsaw Convention, KAL is

> liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[2]

Liability of the carrier arises for an "accident," which is defined as an injury "caused by an unexpected or unusual event or happening that is external to the passenger." *Air France v. Saks*, 470 U.S. 392, 405 (1985).

The District Court for the Southern District of New York dismissed Respondent's claim on the ground that the assault did not constitute an "accident" within the meaning of Article 17 of the Warsaw Convention. Specifically, the District Court

1. Citation to the Petition for Writ of Certiorari will be to "Pet." and citation to the appendices to the Petition will be to Pet. App."

2. Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw, October 12, 1929, 49 Stat. 3000, *reprinted at* 49 U.S.C. App. § 1502 note.

concluded that the injury-causing event in this case was not an "accident" because there "was no act or omission by the aircraft or airline personnel representing a departure from the normal, expected operation of flight," and because the injury-causing event was not "a risk characteristic of air travel or related to the operation of the airplane." Pet. App. 21a-27a.

The Court of Appeals for the Second Circuit reversed. The two-judge majority of the Court below defined "accident" in a manner different from this Court in *Saks* and ruled that no "accident" within the meaning of Article 17 occurs unless the injury-causing event is a "characteristic risk of air travel." Pet. App. 11a-12a. Applying this new definition, and hypothesizing the circumstances surrounding the assault, the majority found that an "accident" occurred within the meaning of Article 17.

Circuit Judge Rosemary Pooler concurred in the result below in a separate opinion. Pet. App. 14a-16a. Judge Pooler correctly observed that the reasoning of the majority was predicated on "a factual issue neither briefed nor argued by counsel." Pet. App. 14a. Respondent did not argue below that the "accident" was caused by a "characteristic risk of air travel" and indeed, correctly asserted that such a limitation on the definition of "accident" was beyond this Court's definition of "accident" in *Saks*. Judge Pooler concluded, as Respondent had argued below, that "[a] co-passenger's tort satisfies the Supreme Court's interpretation of 'accident' as 'an unexpected or unusual event or happening that is external to the passenger,' and the Court did not also include a 'characteristic of air travel' requirement in the definition." Pet. App. 15a.

REASONS FOR DENYING THE WRIT

KAL's principal argument is that this Court should grant the petition because the decision of the court below "conflicts with the decision of the Court of Appeals for the First Circuit in *Langadinos v. American Airlines, Inc.*, 199 F.3d 68 (1st Cir. 2000)." Petition at 9. In that case, the First Circuit ruled that no "accident" within the meaning of Article 17 occurs unless "airline personnel play [a] causal role in the commission of the tort." *Id.* 199 F.3d at 70-71.

There is some degree of conflict among the Courts that have addressed the issue of "accident" in the aftermath of this Court's decision in *Saks*. This Court defined "accident" as "an unexpected or unusual event or happening that is external to the passenger" (*Saks*, 470 U.S. at 405), and Judge Pooler, in her concurring opinion below, faithfully adhered to that definition and found an "accident" within the meaning of Article 17. The First Circuit, and the two-judge majority below, have engrafted new limitations on this Court's definition in *Saks*, by finding an accident only where "airline personnel play [a] causal role in the commission of the tort" (*Langadinos*, 199 F.3d at 70-71), or where the injury was caused by a "characteristic of air travel." Pet. App. 12a.

Against this backdrop, there does not appear to be a direct conflict between the two-judge majority below and the decision of the First Circuit. Both courts would limit recovery to cases in which the airline personnel, or the circumstances of air travel, contributed to the injury. If a conflict exists, it is between the two-judge majority below and the First Circuit, on the one hand, and this Court's decision in *Saks*, on the other hand. The two-judge majority below and the First Circuit have effectively modified the *Saks* definition of "accident." KAL would have this Court revisit and revise its definition of "accident" in *Saks* and adopt new limitations on recovery in a manner similar to that of the First Circuit and the two-judge majority below. This Court should decline that invitation.

Even assuming that KAL has identified a conflict among the Circuits on a question of treaty interpretation, this case may not be an appropriate vehicle for consideration of the issue presented by KAL on its petition.

First, as acknowledged by Petitioner, the Panel's opinion made a series of factual "assumptions" that were not supported by the record. Petition at 6 & n.4. In fact, the opinion of the Panel failed to appreciate that Respondent was not arguing that KAL acted without due care, or that the acts or omissions of KAL caused the accident. This Court should hesitate before agreeing to hear this case because the "factual findings" of the Court of Appeals were not based on the record.

Second, the issue as framed by Petitioner is very narrow. Petitioner asks this Court to grant review to decide whether "a passenger's sexual assault of another passenger in an adjacent seat on board the aircraft constitute[s] an 'accident' within the meaning of Article 17 of the Warsaw Convention despite the absence of a causal role on the part of the air carrier." Petition at i. Sexual assaults of this type are hardly common, and Judge McLaughlin characterized the circumstances of this case as "unique." Pet. App. at 12a. There does not appear to be any compelling reason for this Court to become embroiled in a fact-intensive inquiry that may well be "unique."

CONCLUSION

The Respondent believes that the outcome below was correct. She commenced this action to seek recovery for an "accident" that caused her personal injury and great anguish. The Panel allowed Respondent to proceed on her claim and, insofar as the outcome alone is concerned, the Panel arrived at the correct result. That result should not be disturbed. While there appears to be some degree of conflict among the Circuits concerning the scope and applicability of this Court's definition of "accident," there appear to be reasons that may render this case an inappropriate vehicle for resolving that conflict. Accordingly, the Petition should be denied.

Respectfully submitted,

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(3)

No. 00-560

IN THE
Supreme Court of the United States

KOREAN AIR LINES CO., LTD.,

Petitioner,

v.

BRANDI WALLACE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
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PARTIES TO THE PROCEEDING

The following persons and entities were parties before the United States Court of Appeals for the Second Circuit:

1. Petitioner KOREAN AIR LINES CO., LTD.

2. Respondent Brandi Wallace

STATEMENT PURSUANT TO RULE 29.6

Petitioner KOREAN AIR LINES CO., LTD. ("KAL") is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL has no parent company but is a member of The Hanjin Group of Korea, which comprises companies under common management direction. No publicly held company owns 10% or more of KAL's stock.

PRELIMINARY STATEMENT

Petitioner Korean Air Lines Co., Ltd. ("KAL") respectfully submits this Reply Brief to respondent's Brief in Opposition.

ARGUMENT

Respondent Brandi Wallace attempts to minimize the conflict among the lower courts as to the meaning of an Article 17 "accident" and agrees that the majority decision of the court below is based on an incorrect interpretation of a treaty of the United States.[1] Respondent nevertheless argues that the Court should deny the Petition because respondent is pleased with the result below. Respondent's acknowledgment that the interpretation of Article 17 by the court below is irreconcilable with the Court's interpretation of this treaty,[2] but allegedly can be reconciled with the interpretation of the First Circuit,[3] serves to highlight that the Petition should be granted.

A. *Certiorari* Is Necessary When, As Here, Conflicts Exist in the Interpretation of a Treaty

A conflict exists "among the Courts that have addressed the issue of 'accident' in the aftermath of this Court's decision in *Saks*" (Brief in Opposition at 3), yet respondent urges the

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1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (*reprinted in* note following 49 U.S.C.A. § 40105) ("Warsaw Convention"). The pertinent provisions are set forth in the Appendix to KAL's Petition for Writ of Certiorari at A 31a.

2. *See Air France v. Saks*, 470 U.S. 392 (1985).

3. *See Langadinos v. American Airlines, Inc.*, 199 F.3d 68 (1st Cir. 2000).

Court to ignore the conflict. The Court of Appeals in *Langadinos* requires a causal role for there to be an "accident"; the court below, however, requires no causal role. A 12-13a. These decisions are irreconcilable as between themselves and, more importantly, irreconcilable with the history of the Warsaw Convention. *See* Petition for Writ of Certiorari at 10 n.6 & 19-25.

Moreover, respondent agrees that the decision of the court below "conflicts" with the Court's decision in *Saks*. Brief in Opposition at 3. Such a "conflict" alone warrants the granting of the Petition.

KAL does not seek the Court to "revisit and revise" the definition of "accident" in *Saks*. Brief in Opposition at 3. KAL only requests the Court to reconcile the definitions of "accident" adopted by the lower courts by addressing an issue not presented in *Saks*.

B. The Question Presented Raises An Important Legal Question of Federal Treaty Law, Not Limited to the Question of Liability for a Passenger's Sexual Misconduct

Both respondent and KAL agree that no acts or omissions of KAL caused or contributed to respondent's alleged injuries, and respondent does not claim that there is any dispute among the parties as to the facts. Thus, irrespective of whether the decision of the court below is based on a "series of 'factual assumptions' that were not supported by the record" (Brief in Opposition at 4), the Petition requires resolution of a broad issue of treaty interpretation. The question presented is independent of any "factual assumptions." Specifically, the Petition requires the Court to fulfil its role as the ultimate arbiter of the proper construction of a treaty, and thus to uphold the construction of

Article 17 as reflected in the *Langadinos* decision and the post-ratification understanding of Article 17 by the contracting parties to the Warsaw Convention.

Respondent's final argument against the issuance of a writ of *certiorari*, that the issue presented for review is too "narrow," also is ill considered. Brief in Opposition at 4. The crux of the question presented is whether a passenger-on-passenger assault (sexual or otherwise) can be an Article 17 accident in the absence of any causal role on the part of the air carrier, ostensibly basing liability under Article 17 upon the fact that there was an "occurrence" on an aircraft, the position of the Ninth Circuit which can only properly be understood as having been rejected by the Court in *Saks*. *See Saks*, 470 U.S. at 405-07. The question presented involves an inquiry into the legal meaning of an Article 17 "accident," which continues to arise in every passenger case governed by the Warsaw Convention and continues to be misapplied by the court below.

The Court should grant KAL's Petition to vacate the holding of the court below, which is contrary to the rationale and holding of *Saks*, to resolve the conflict among the lower courts and to uphold the intentions of the drafters of this treaty. The Court should ensure that the "accident" requirement of this treaty is applied as intended by the contracting parties, who for over 70 years have understood that this treaty does *not* create liability for passenger-on-passenger assaults.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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